

4600012882
2014-0756

THE STATE OF TEXAS §
 §
COUNTY OF HARRIS §

THIS AGREEMENT FOR SOFTWARE LICENSES AND SERVICES RELATED TO AN ENTERPRISE RESOURCE PLANNING SYSTEM (“Restated Agreement”) is made on the Countersignature Date between the **CITY OF HOUSTON, TEXAS** (“City”), a Texas Home-Rule City, and **SAP Public Services, Inc.** (“Contractor”), a Delaware corporation doing business in Texas.

BACKGROUND:

By Ordinance No. 2005-0405, passed and adopted by City Council on April 27, 2005, the City entered into contract number C56871 effective April 29, 2005 (“Original Contract”) with Contractor for providing and maintaining an Enterprise Resource Planning System. The term “Original Contract” as used in this Restated Agreement shall also mean and include all appendices, exhibits, and change orders thereto. For the City’s internal informational purposes only, the Original Contract contract number is 4600006180.

By Ordinance No. 2008-0331, passed and adopted by City Council on April 16, 2008, the City first amended the Original Contract effective April 25, 2008 (“First Amendment”) with Contractor to extend the contract term, obtain specialized SAP services, and provide for the continued use and maintenance of the Enterprise Resource Planning System. The term “First Amendment” as used in this Restated Agreement shall also mean and include all appendices, exhibits, and change orders thereto.

The City and Contractor now desire to enter into this Restated Agreement, which incorporates the Original Contract and First Amendment and further provides for the purchase of

additional SAP enterprise systems, licenses, maintenance, and related professional services for the Enterprise Resource Planning System.

For and in consideration of the mutual promises, covenants, agreements, and benefits contained in this Restated Agreement, the City and Contractor agree as follows:

I.

The Original Contract is attached to and hereby incorporated and made a part of this Restated Agreement. Except as amended in the First Amendment and/or expressly amended or stated in this Restated Agreement, all of the terms and conditions set forth in the Original Contract shall apply for the term of this Restated Agreement (including any Renewal Periods) and the Parties shall comply with all of the terms and conditions of the Original Contract.

II.

The First Amendment is attached to and hereby incorporated and made a part of this Restated Agreement. Except as expressly amended or stated in this Restated Agreement, all of the terms and conditions set forth in the First Amendment shall apply for the term of this Restated Agreement (including any Renewal Periods) and the Parties shall comply with all of the terms and conditions of the First Amendment, including but not limited to those terms and conditions of the Original Contract amended by the First Amendment.

The following Sections contain amendments, modifications, or additions to the terms and conditions of the Original Contract and First Amendment.

III.

The following new definitions are added to Section II, "Definitions" of the Original Contract, as amended by the First Amendment:

"Countersignature Date" means the date the City Controller signs this Restated Agreement.

The definition of “Services” in the Original Contract is deleted in its entirety and replaced with the following: “Services” means software consulting and professional services set out in a Statement of Work or Scope of Work.

As used in this Restated Amendment, “Statement of Work” shall have the same meaning as “Scope of Work” as defined in the First Amendment. The term “Scope of Work” as used in the First Amendment and this Restated Agreement shall also mean and include “Statement of Work.”

IV.

The last paragraph of Section III (E)(1), “Additional Products and Services” is hereby amended to read as follows:

Total charges for additional Services and software Licenses added to this Restated Agreement must never exceed **25%** of the Maximum Contract Amount set forth by the Ordinance approving this Restated Amendment unless:

- the additions are exempt from the competitive bidding or proposal requirements, set forth in Tex. Local Govt. Code Chapter 252; or
- the City acquires the additions from Contractor through a competitive bid or competitive proposal.

V.

Section III (E)(2), “Change Orders” is hereby deleted in its entirety and replaced with the following:

(2) Change Orders

The Director may request Change Orders to add Software Licenses, Deliverables, or Services without the need to return to Council for approval as long as (a) Council has appropriated sufficient funds to pay for such Change Orders and (b) the amount does not exceed

\$100,000, which amount shall be calculated for each Change Order to Exhibit C based on the total net license fees for each Change Order, and which amount shall be calculated for each approved Scope of Work based on the total amount per phase of the Scope of Work, if any.

VI.

Section III (F), "Prompt Payment of Subcontractors" is hereby deleted in its entirety and replaced with the following:

F. Prompt Payment of Subcontractors

Contractor shall make timely payments to all persons and entities supplying labor, materials, or equipment for the performance of this Restated Agreement. **CONTRACTOR SHALL DEFEND AND INDEMNIFY THE CITY FROM ANY CLAIMS OR LIABILITY ARISING OUT OF CONTRACTOR'S FAILURE TO MAKE THESE PAYMENTS OR DELAY IN MAKING NON-DISPUTED PAYMENTS TO SUBCONTRACTORS.**

VII.

Section III(L), "Insurance," is hereby deleted and replaced in its entirety with the following:

L. Insurance

INSURANCE: Contractor shall maintain insurance, including the coverage and limits of liability described in this Restated Agreement in full force and effect at all times during the term of this Restated Agreement and any extensions thereto. Such insurance is described as follows:

1. **Insurance Policies and Limits of Liability**

COVERAGE

Workers' Compensation

LIMIT OF LIABILITY

Statutory for Workers' Compensation

COVERAGE

Employer's Liability

Commercial General Liability:

Including but not limited to coverage for Bodily and Personal Injury; Products and Completed Operations Coverage; Death; Property Damage; Premises/Operations; Contractual; Advertising Injury Liabilities

Automobile Liability

Professional Liability (Errors & Omissions) Coverage covering claims arising out of errors or omissions in connection with products or services provided by Contractor as described in this Restated Agreement, as well as claims related to unauthorized disclosure and unauthorized access to personally identifiable non-public, the City's and third party confidential corporate information in care, custody and control of Contractor. The policy shall have a retroactive date on or before this Restated Agreement effective date or the date of Contractor's first professional service, whichever is earlier.

Excess/Umbrella liability

LIMIT OF LIABILITY

- Bodily Injury by Accident
\$1,000,000 (each accident)
- Bodily Injury by Disease
\$1,000,000 (policy limit)
- Bodily Injury by Disease
\$1,000,000 (each employee)

Bodily Injury and Property Damage,
Combined Limits of \$1,000,000 each
Occurrence, and \$2,000,000 aggregate

\$1,000,000 combined single limit for
(1) Any Auto or (2) All Owned,
Hired, Leased, and Non-Owned Autos

\$1,000,000 per claim/aggregate

\$3,000,000 per occurrence with

COVERAGE

LIMIT OF LIABILITY

respect to coverages for Commercial
General Liability, Automobile
Liability, and Employer's Liability
above

Aggregate Limits are per 12-months policy period unless otherwise indicated.

If professional liability coverage is written on a "claims made" basis, Contractor shall maintain coverage and also provide proof of renewal each year for two years, via a certificate of insurance approved by the City Attorney or an ACORD form approved by the Texas Department of Insurance, after expiration or termination of the Restated Agreement, or in the alternative, provide evidence of extended reporting period coverage for a period of 2 years after the Agreement terminates or expires.

2. Form of Policies

The insurance and limits required herein can be met with a combination of primary and umbrella/excess policy(ies), however such approval from the Director shall never excuse non-compliance with the terms of this Section.

3. Issuers of Policies

The issuer of any policy (1) shall have a Certificate of Authority to transact insurance business in Texas or (2) shall be an eligible non-admitted insurer in the State of Texas and shall have a financial rating equivalent of an AM Best's rating of at least "A-" and an AM Best's Financial size Category of Class VIII or better, "AA" by Moody's or "AA" by Standard & Poor's, according to the most current standards or rating guide promulgated by the aforementioned rating organizations.

4. Insured Parties

Contractor shall include the City, its agents, employees and officers, and legal representatives (collectively the "City") as an additional insured on Contractor's original commercial general and auto liability insurance policies and all renewals or replacements during the term of this Restated Agreement, but only with respect to claims, liabilities, or circumstances described in Article III(H), Indemnification, of the Original Contract, and only to the extent covered by Contractor's insurance policies. This requirement can be satisfied via a blanket additional insured endorsement provided alongside a certificate of insurance approved by the City Attorney or an ACORD form approved by the Texas Department of Insurance.

5. Deductibles

Contractor shall be responsible for and pay any deductibles or self-insured retentions under the aforementioned policies required under this Restated Agreement. Contractor waives any claim it may have against the City, its officers, or employees for payment of any deductibles or self-insured retentions.

6. Cancellation

Contractor shall provide the Director thirty (30) days advance written notice in the event of cancellation of Contractor's insurance coverage required herein. Within the thirty (30) day period, Contractor shall provide evidence of replacement policies in lieu of those about to be canceled or non-renewed so as to maintain in effect the required coverage, in the alternative, Contractor shall inform the Director about its intent to wholly self-insure any of the policies required herein. If Contractor does not comply with this requirement, the Director, at his or her sole discretion, may immediately suspend Contractor from any further performance under this Restated Agreement and begin procedures to terminate for default.

7. Subrogation

With respect to claims, liabilities, or circumstances described in Article III(H), Indemnification, of the Original Contract, and only to the extent covered by Contractor's insurance policies and permitted by law, the workers' compensation, commercial general and auto liability insurance policies, will contain a waiver of subrogation in favor of the City, its employees and officers. This requirement can be satisfied via a blanket endorsement provided alongside a certificate of insurance approved by the City Attorney or an ACORD form approved by the Texas Department of Insurance.

8. Endorsement of Primary Insurance

With respect to claims, liabilities, or circumstances described in Article III(H), Indemnification, of the Original Contract, and only to the extent covered by Contractor's insurance policies, the Commercial General Liability and Commercial Auto Liability policies shall contain an endorsement that the policies are primary and any insurance maintained by the City shall be excess and not contributory with the insurance as required herein. This requirement can be satisfied via a blanket endorsement provided alongside a certificate of insurance approved by the City Attorney or an ACORD form approved by the Texas Department of Insurance

9. Liability for Premium

Contractor shall be responsible for paying all premiums for its insurance policies and the City shall not be obligated to pay any premiums for Contractor's insurance policies.

10. Subcontractors

Contractor shall require all subcontractors to carry insurance that include the City as an additional insured and meeting all of the above requirements, except for the amount. The coverage amounts must be commensurate with the amount of the subcontract, but in no case less

than \$500,000 per occurrence. Upon request, Contractor shall provide copies of subcontractors' insurance certificates to the Director.

11. Delivery of Policies

(a) At the time this Restated Agreement is signed and as long as this Restated Agreement continues, Contractor must furnish to the Director certificates of insurance approved by the City Attorney or an ACORD form approved by the Texas Department of Insurance, including any necessary blanket endorsements that meet the requirements of this Restated Agreement. These certificates must bear the Contractor's name in which it is insured.

In the event of a claim or lawsuit involving the Contractor and the City, where the Contractor's insurer issues a reservation of rights letter or coverage denial letter to the City, Contractor further agrees, upon written request from the Director, to furnish copy(ies) of Contractor's policy(ies), cited by your insurer; however, it is agreed that only portions of the policy(ies) containing pertinent information or excerpts of the policy(ies) that is specifically referenced in such reservation of rights or coverage denial letter issued to the City will be provided to the Director.

In the event of a claim or lawsuit involving the Contractor and the City, where the Contractor's insurer issues a reservation of rights letter or coverage denial letter to the City, Contractor further agrees, upon request, to allow the City to review insurance policy under which coverage was sought under the following conditions:

- 1) Contractor will allow supervised viewing of policy(ies) in question at the Contractor's office closest to the City.

- 2) The City and its representatives will not be permitted to take pictures, photocopy, or in any way obtain or make an image of the policy(ies) under review.
- 3) An authorized representative of the Contractor will be present in the room at all times while the policies(ies) are being reviewed.

Contractor shall provide updated certificates of insurance to the Director annually upon renewal of Contractor's insurance policies. Every certificate of insurance Contractor delivers to the City shall:

- (1) be less than 12 months old;
- (2) include all pertinent identification information for the Insurer, including the company name and address, policy number, NAIC number or AMB number;
- (3) include the Project name and reference numbers and indicate the name and address of the Project Manager in the Certificate Holder Box; and
- (4) be appropriately marked to accurately identify
 - i) all coverages and limits as required herein;
 - ii) effective and expiration dates; and
 - iii) be accompanied by blanket endorsements as required herein.

As an alternative, Contractor may insure the above coverages under a plan of self-insurance, subject to the restrictions set forth in this Section. In the event that Contractor moves to fully self-insure any policy required herein, Contractor shall comply with any applicable Texas state laws and local laws and regulations regarding self-insurance. Upon written request by the Director, Contractor shall provide the Director with a copy of the most recent audited

financial statement from SAP SE, Contractor's parent company, showing self-insurance reserves or other assets sufficient to pay judgments equal to the limits set forth above. To the extent Contractor decides to wholly self-insure policies where the City is included as an additional insured, Contractor's self-insurance must protect the City to the same extent as an additional insured status on a policy issued by an insurance company as such insurance coverage is required herein.

(b) Contractor shall continuously and without interruption, maintain in force the required insurance coverage or self-insurance coverage specified in this Section. If Contractor does not comply with this requirement, the Director, at his or her sole discretion, may immediately suspend Contractor from any further performance under this Restated Agreement and begin procedures to terminate for default.

(c) The City shall never waive or be estopped to assert its rights to terminate this Restated Agreement because of its acts or omissions regarding its review of insurance documents.

(d) Contractor shall, upon the Director's request, attempt to deliver a letter from Contractor's Broker(s) stating that the Contractor intends to renew policy(ies) that meet the terms of this Restated Agreement. Where possible, such requests will be limited to instances where a policy expiration date listed on the certificate of insurance is less than 30 days from the date Contractor delivers the certificate of insurance to the Director.

(e) None of the requirements contained herein as to types or limits or the Director's approval of insurance coverages to be maintained by Contractor are intended to, and shall not in any manner, limit, qualify or quantify the liabilities and obligations assumed by Contractor under this Restated Agreement.

12. Other Insurance

If requested by the Director, Contractor shall furnish adequate evidence of Social Security and Unemployment Compensation Insurance, to the extent applicable to Contractor's operations under this Restated Agreement and to the extent such insurance is required by law.

VIII.

Section III(R), "MWBE Compliance" and the corresponding Exhibit "H" are hereby deleted in their entirety and Section III(R), "MWBE Compliance" is replaced with the following:

R. MWBE Compliance

Contractor shall comply with the City's Minority and Women Business Enterprise ("MWBE") programs as set out in Chapter 15, Article V of the City of Houston Code of Ordinances. Contractor shall make good faith efforts to award subcontracts or supply agreements in at least 35% of the total value of the Services portion of this Restated Agreement to MWBEs, where for purposes of this provision, "total value" means the aggregate of the total professional and consulting fees specified in Scope(s) of Work/Statement(s) of Work to this Restated Agreement. For avoidance of doubt, the parties acknowledge and agree that fees for the Services portion of the Original Contract and the First Amendment shall not be included when calculating such 35% allocation. Contractor acknowledges that it has reviewed the requirements for good faith efforts on file with the City's Office of Business Opportunity and will comply with them.

IX.

Section IV(E), "Limit of Appropriation" is hereby deleted in its entirety and replaced with the following:

E. Limit of Appropriation

(1) The City's duty to pay money to Contractor for any purpose under this Restated Agreement is limited in its entirety by the provisions of this Section.

(2) In order to comply with Article II, Sections 19 and 19a of the City's Charter and Article XI, Section 5 of the Texas Constitution, the City has appropriated and allocated the sum of \$1,493,430.00 to pay money due under this Restated Agreement (the "Original Allocation"). The executive and legislative officers of the City, in their discretion, may allocate supplemental funds for this Restated Agreement, but they are not obligated to do so. Therefore, the parties have agreed to the following procedures and remedies.

(3) The City makes a Supplemental Allocation by issuing to Contractor a service release order, or similar form approved by the City Controller, containing the language set out below. When necessary, the Supplemental Allocation shall be approved by motion or ordinance of City Council.

NOTICE OF SUPPLEMENTAL ALLOCATION OF FUNDS

By the signature below, the City Controller certifies that, upon the request of the responsible director, the supplemental sum set out below has been allocated for the purposes of the Restated Agreement out of funds appropriated for this purpose by the City Council of the City of Houston. This supplemental allocation has been charged to such appropriation.

\$ _____

(4) City Council delegates to the Director the authority to approve up to \$100,000.00 in supplemental allocations for this Restated Agreement without returning to Council.

(5) The Original Allocation plus all supplemental allocations are the Allocated Funds. The City shall never be obligated to pay any money under this Restated Agreement in excess of the Allocated Funds. Contractor must assure itself that sufficient allocations have been made to pay for services it provides. Contractor may from time to time inquire as to the balance of Allocated Funds remaining in this Restated Agreement, and the Director shall report the balance to Contractor. If Allocated Funds are exhausted Contractor is not obligated to continue to perform unless it receives a notice of Supplemental Allocation. If Allocated Funds are exhausted, Contractor's only remedy is suspension of its performance until it receives notice of a sufficient Supplemental Allocation or termination of its performance under this Restated Agreement altogether and it has no other remedy in law or in equity against the City and no right to damages of any kind. If the City terminates Contractor performance due to lack of Allocated Funds, such termination shall not constitute a material breach by City.

X.

Section 1.8 of Exhibit C, Software End-User License Agreement, to the Original Contract is deleted in its entirety and replaced with the following: "Subsidiary" means a corporation in the Territory of which City owns more than fifty percent of the voting securities or which is a local government corporation created by the City of Houston in accordance with applicable Texas laws and City policies, provided that: (a) the Subsidiary is subject to the allocation and appropriation of funds by City Council; (b) the Director affirms, in writing and before any expenses are incurred by or charged to the City, that the Subsidiary is permitted to be included in the City's license counts under this Restated Agreement; and (c) the entity will be considered a

Subsidiary for only such time as such equity interest is maintained by the City, if any equity interest exists. For purposes of this Restated Agreement, the City, acting through its Mayor or City Council, must have the ability or the right to appoint or remove a majority of the board of directors of the Subsidiary.

The following sections adds terms and conditions governing this Restated Agreement, which terms and conditions are not present or operative in the Original Contract or First Amendment, as they are currently amended.

XI.

Resource Rates. Notwithstanding anything to the contrary set forth in the Original Contract and / or in the First Amendment as amended, the following Contractor resource / consultant type(s), corresponding hourly rates, and associated rate and remuneration terms and conditions shall apply to Services provided by Contractor to the City on a time and materials basis during the term of this Restated Agreement (including any Renewal Periods).

RESOURCE / CONSULTANT TYPE:

K1	=	Junior Consultant
K2	=	Consultant I
K3	=	Consultant II
K4	=	Consultant III
K5	=	Senior Consultant/Management Consultant
K6	=	Lead Consultant/Project Implementation Manager/Implementation Specialist
K7	=	Developer / Consulting Manager / Platinum or Senior Consultant / Global Support Manager / Senior Project Implementation Manager / Industry Specialist
K8	=	Senior Developer / Consulting Director / Consulting Vice President

RATES:

The rates applicable to each category in US dollars are as follows:

	K1	K2	K3	K4	K5	K6	K7	K8
SAP Public Service Hourly Rate^(a)	135.00	160.00	190.00	221.00	268.00	317.00	352.00	400.00

(a) The rates set forth above are subject to change in accord with this Article XI.

Contractor shall provide Services at the SAP Public Services Hourly Rate(s) stated above, exclusive of expenses, subject to the following terms and conditions:

(i) The SAP Public Services Hourly Rates set forth in the table above are in effect commencing on the Countersignature Date. During the first two (2) years of the First Term of this Restated Agreement, such SAP Public Services Hourly Rates are subject to change by Contractor at any time upon thirty (30) days' written notice to the City, provided that any increased rate(s) shall not exceed the prior rate(s) plus an adjustment made for increases in the consumer price index ("CPI") plus 3%. CPI as used herein means U.S. Consumer Price Index for all Urban Consumers, U.S. City Average - All Items 1982-1984 = 100 Base for the applicable twelve (12) month period as published by the Bureau of Labor Statistics. After the first two (2) years of the First Term of this Restated Agreement, the SAP Public Services Hourly Rates are subject to change by Contractor at any time upon thirty (30) days' written notice to the City. The SAP Public Service Hourly Rates billed to the City for any Services provided by Contractor under this Restated Agreement or a Scope of Work shall not exceed the Contractor's then-current rates for such Services.

(ii) SAP shall respond to the City's written request for Services, and will work with the City to finalize a Scope of Work/Statement of Work, within a commercially reasonable period of time. Each Scope Of Work shall identify the location of the City's facility where

SAP's resources will perform the services under such Scope Of Work ("Services Location"). In performing Services under any Scope of Work, Contractor shall use commercially reasonable efforts to provide resources / consultants who reside locally to the Service Location.

(iii) Contractor shall bill the City monthly for expenses as actually incurred, unless otherwise agreed to by the Parties in a signed Scope of Work. For purposes of Section V of the Original Contract, payment for Services performed shall include the incurred expenses.

(iv) Contractor's SAP Public Services Hourly Rate(s) are based on eight hours of work daily. Contractor is permitted to calculate up to four working hours per day for deployments of resources to the Service Location. Contractor's SAP Public Services Hourly Rate(s) shall also apply for any hours worked during night shifts or weekends or hours worked in excess of 40 hours during a City or Contractor workweek, unless Contractor obtains the Director's written approval to modify the hourly rate(s). Contractor's resources / consultants shall not work more than 40 hours during a City or Contractor workweek unless coordinated in advance with the Director and Contractor obtains the Director's prior written consent for the additional work. In the event the Director approves, in writing, any overtime compensation or modification of the SAP Public Services Hourly Rate(s) for night shifts or weekend work, the compensation shall be on a proportional basis and calculated at no more than time-and-a-half.

(v) The Services provided by Contractor shall be invoiced monthly on a time and materials basis in accordance with the Scope of Work signed by the parties under which the Services are performed. The invoice shall include a list of the activities to which it refers and applicable expenses. If mutually agreed upon by the Parties and authorized in the Scope of Work, Contractor may perform Services on a fixed price basis. Further, SAP may issue separate monthly invoices for time and related expenses. The parties agree that, for purposes of Section

IV (C-1), "Payment For Professional Services Requested By Director", if Acceptance is not otherwise defined in a Scope of Work, then Acceptance under such Scope of Work shall be defined that Acceptance shall be deemed to occur upon delivery of the Services.

(vi) The terms of this Article XI apply solely to Services provided by Contractor under Scope(s) of Work/Statement(s) of Work to this Restated Agreement for the Software licensed under this Restated Agreement and shall not apply to any training, education, support, development, cloud related or other services that may be provided by Contractor to the City.

XII.

Agreement Term. This Restated Agreement, including the attached and incorporated exhibits, is effective on the Countersignature Date and shall remain in effect for four (4) years ("the First Term"), unless sooner terminated under the provisions of this Restated Agreement. The First Term as set forth in this Restated Agreement supersedes any term periods stated in the Original Contract and First Amendment. The term of any Software License and Maintenance Agreement is set out therein and shall survive the termination of this Restated Agreement.

Renewals. Upon expiration of the First Term and so long as the City makes sufficient supplemental funding allocations, this Restated Agreement will be automatically renewed for up to an additional five successive one-year terms ("Renewal Periods") on the same terms and conditions. If the Director chooses not to renew this Restated Agreement, the Director shall notify Contractor of non-renewal at least 30 days before the expiration of the then-current term. The Renewal Periods as set forth in this Restated Agreement supersede any Renewal Periods stated in the Original Contract and First Amendment.

XIII.

In the event of a conflict between the Original Contract, the First Amendment, and this Restated Agreement, this Restated Agreement shall prevail.

(Remainder of page intentionally left blank)

XIV.


Signatures

The Parties have executed this Restated Agreement in multiple copies, each of which is an original.

**ATTEST/SEAL (if a corporation):
WITNESS (if not a corporation):**

By: _____
Name: _____
Title: _____
Date: _____


SAP PUBLIC SERVICES, INC.

By: 
Name: Mary Beth Hanks
Title: Corp. Secretary
Tax I.D. No. 54-1865804

REVIEWED BY CONTRACTS

K. Devlin KAD

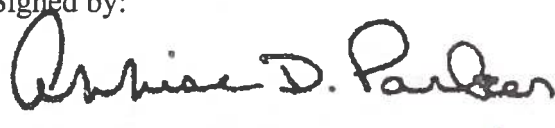
ATTEST/SEAL:



City Secretary

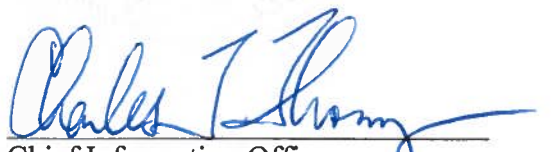
CITY OF HOUSTON, TEXAS

Signed by:




Mayor Brenda D. Murphy

APPROVED BY:



Chief Information Officer
Houston Information Technology Services

COUNTERSIGNED BY:



City Controller Ronald C. Henry

APPROVED AS TO FORM:



Sr. Assistant City Attorney
L.D. File No. 0451300049001

DATE COUNTERSIGNED:

8-19-14

CHANGE ORDER NO. 10
Issued August __, 2014 ("Change Order")
to
Agreement for Software Licenses and Services effective August __, 2014 ("Restated Agreement")
which incorporates
Exhibit C
to
Agreement for Software Licenses and Services effective April 29, 2005 ("Original Contract")
between
SAP Public Services, Inc. ("SAP")
and
City of Houston ("City" or "COH" or "Licensee")

As of the issuance date of this Change Order, this Change Order modifies the above referenced Restated Agreement. In any instance in which a provision of this Change Order contradicts or is inconsistent with the provisions of the Restated Agreement, the provisions of this Change Order shall prevail and govern and the inconsistent provisions of the Restated Agreement shall be deemed amended accordingly. Except as provided in this Change Order, all the terms and conditions of the Restated Agreement shall continue in full force and effect.

1. Describe the reason for the requested change:
Licensee desires to license certain additional Named Users from SAP, and SAP agrees to provide such license to Licensee, subject to the terms of this Change Order and of Attachment 1 to this Change Order, provided Licensee executes this Change Order by August 31, 2014.
2. A. Describe the impact, if any, on existing Deliverables:
None

B. Describe additional Deliverables required as a result of the requested change, if any:
None
3. Describe the impact, if any, to the existing Project Schedule. Provide a revised Project Schedule, if appropriate.
None
4. Describe the impact to Project Staffing.
None
5. State the estimated change, if any, to the project fees and/or costs. Provide the rationale/methodology used to calculate any change.
See Attachment 1 to this Change Order. The City agrees that, by executing this Change Order, the City has allocated the funds necessary to pay the Software License Fees and Year 1 Enterprise Support Fees set forth in Attachment 1 to this Change Order.

SAP and Licensee hereby agree to the following changes to the Restated Agreement:

- i. Attachment 1 to this Change Order is incorporated into the Restated Agreement as Appendix 15 to Exhibit C to the Original Contract.
- ii. The Table of Contents of Exhibit C to the Original Contract shall be amended to include the following:
"21. Appendix 15"
- iii. The parties hereby agree that Appendix 15 shall not be separately executed by the parties, but shall be considered accepted by the parties upon execution of this Change Order by both parties.

Pursuant to the authority delegated in Article III E of the Restated Agreement, the Parties agree to this Change Order and to Attachment 1 to this Change Order which is incorporated herein for all purposes. Upon execution of this document by the persons set out below, the above Restated Agreement shall be modified as set out in this Change Order and in Attachment 1 to this Change Order.

ATTEST/SEAL (if a corporation):
WITNESS (if not a corporation):

SAP PUBLIC SERVICES, INC.

By: _____
Name: _____
Title: _____
Date: _____

By: [Signature]
Name: Nancy Beth Hanks
Title: COO Secretary
Tax I.D. No. 54-1865804

REVIEWED BY CONTRACTS

ATTEST/SEAL:

CITY OF HOUSTON, TEXAS

K. Devlin KAD

Signed by:

[Signature]
City Secretary

[Signature]
Mayor Brenda L. Murphy

APPROVED BY:

COUNTERSIGNED BY:

[Signature]
Chief Information Officer
Houston Information Technology Services

[Signature]
City Controller Jenard Polch

APPROVED AS TO FORM:

DATE COUNTERSIGNED:

[Signature]
Sr. Assistant City Attorney
L.D. File No. 0451300049001

8-19-14

Attachment No. 1
to
CHANGE ORDER NO. 10
Issued August __, 2014 ("Change Order")

Appendix 15 effective August __, 2014 ("Appendix")
to
Agreement for Software Licenses and Services effective August __, 2014 ("Restated Agreement")
which incorporates
Exhibit C
to
Agreement for Software Licenses and Services effective April 29, 2005 ("Original Contract")
between
SAP Public Services, Inc. ("SAP")
and
City of Houston ("City" or "COH" or "Licensee")

This Appendix is hereby annexed to and made a part of the Agreement specified above. In each instance in which provisions of this Appendix contradict or are inconsistent with the provisions of the Agreement, the provisions of this Appendix shall prevail and govern.

1. **NAMED USER DEFINITIONS:** As used herein, SAP BusinessObjects Portfolio ("SBOP") shall mean any licensed Software or third party software identified under Appendices to the Agreement as an applicable Business Intelligence or Information Management package or product (if any), Enterprise Performance Management package or product (if any), and/or Governance, Risk and Compliance package or product (if any). Unless otherwise specifically set forth herein, all references to "SBOP" shall be deemed to include any licensed Software identified under Appendices to the Agreement as "Legacy SBOP"; however, references to "Legacy SBOP" shall only mean any licensed Software identified under Appendices to the Agreement as "Legacy SBOP".

"SAP Business Suite Developer User" is a Named User authorized to access the development tools provided with the licensed Software for the purpose of making Modifications to the licensed Software and also includes the rights granted under the SAP NetWeaver Developer User and SAP Business Suite Employee User.

"SAP NetWeaver Developer User" is a Named User who is authorized (only where the SAP NetWeaver Foundation for Third Party Applications Software is licensed) to access the development tools provided with such Software for the purpose of developing and modifying applications (i) that are not licensed from SAP AG, any SAP AG distributor(s), or any authorized resellers of SAP AG or its distributor(s) and (ii) for which Licensee has first secured all appropriate rights from any applicable licensor(s). The SAP NetWeaver Developer User also includes the rights granted under the SAP NetWeaver Administrator User.

"SAP NetWeaver Administrator User" is a Named User who is authorized (only where the SAP NetWeaver Foundation for Third Party Applications Software is licensed) to access the development tools provided with such Software for the purpose of administering and managing applications (i) that are not licensed from SAP AG, any SAP AG distributor(s), or any authorized resellers of SAP AG or its distributor(s) and (ii) for which Licensee has first secured all appropriate rights from any applicable licensor(s).

"SAP Business Suite Employee User" is a Named User authorized to perform the following roles supported by the licensed Software (excluding SBOP), all solely for such individual's own purpose and not for or on behalf of other individuals: (i) Use (excluding the right to modify and/or customize) standard and interactive reports delivered with the licensed Software, (ii) travel planning / expense reporting self-services, (iii) perform desktop procurement self-services, and (iv) room reservation self-services. Each SAP Business Suite Employee User also includes the rights granted under the SAP Business Suite ESS User.

"SAP Business Suite Employee Self-Service (ESS) User" is a Named User authorized to perform the Human Resource self-services role of employee time and attendance entry supported by the licensed Software (excluding SBOP), all solely for such individual's own purpose and not for or on behalf of other individuals. Each SAP Business Suite ESS User also includes the rights granted under the SAP Business Suite Employee Self-Service Core User and the SAP Human Capital Performance Management User.

year and the next full calendar year ("Initial Term"). After the Initial Term and subject to the Agreement and SAP Enterprise Support Schedule, SAP Enterprise Support shall renew at the beginning of each calendar year for the subsequent one year period.

The SAP Enterprise Support Fee for the Software licensed under this Appendix is priced at the then current annual SAP Enterprise Support Factor in effect (currently 22%) multiplied by the total Net License Fee for the licensed Software. The current annual SAP Enterprise Support Fee for the Software licensed under this Appendix is USD 12,830.40 (22% of USD 58,320.00). SAP agrees that the SAP Enterprise Support Factor shall remain at 22% until December 31, 2016. Thereafter, the SAP Enterprise Support Fee is subject to change once during a calendar year upon ninety (90) days' notice to Licensee.

SAP Enterprise Support Fees are invoiced on an annual basis effective January 1 of a calendar year and payable Net 30 days from date of invoice. Any SAP Enterprise Support Fees due prior to January 1 are invoiced on a pro-rata basis for the given calendar year in effect.

6. **DATABASE:** Licensee may only Use the runtime database licensed pursuant to Section 2.2 hereof in conjunction with its Use of the Software licensed hereunder in accordance with the terms of this Appendix. In the event Licensee uses the licensed runtime database other than as specified in this Section 6, a full use license, including programming tools, must be licensed directly from the applicable third party database vendor. In no event shall SAP's or its licensors' total liability for all claims and damages of any kind or nature in any way arising from or related to the runtime database licensed under this Appendix exceed the individual Net License Fee attributable to the runtime database, as reflected in Section 3 hereof.
7. **VALIDITY OF OFFER:** The validity of this Appendix will expire August 31, 2014, unless the Change Order to which this Appendix is attached is sooner executed by Licensee.

THE STATE OF TEXAS :
:
COUNTY OF HARRIS :

56871
OS-0405

I. PARTIES

COPY

A. Address

THIS AGREEMENT FOR SOFTWARE LICENSES AND SERVICES RELATED TO AN ENTERPRISE RESOURCE SYSTEM ("Agreement") is made on the Countersignature Date between the **CITY OF HOUSTON, TEXAS ("City")**, a Texas Home-Rule City, and SAP Public Services, Inc. ("Contractor"), a Delaware corporation doing business in Texas.

The initial addresses of the parties, which one party may change by giving written notice to *the other party, are as follows:*

City

Chief Information Officer
or Designee
City of Houston
P.O. Box
Houston, Texas

Contractor

Director of Contracts
3999 West Chester Park
Newton Square, PA 19073

The Parties agree as follows:

B. Table of Contents

This Agreement consists of the following sections:

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- H. MWBE SUBCONTRACT TERMS
- I. PERFORMANCE BOND

C. Parts Incorporated

The above-described sections and exhibits are incorporated into this Agreement.

D. Controlling Parts

If a conflict among the sections and exhibits arises, the exhibits control over the sections. All software license terms are in Exhibit "C".

(end of this page)


E. Signatures

The Parties have executed this Agreement in multiple copies, each of which is an original.

ATTEST/SEAL (if a corporation):
WITNESS (if not a corporation):

SAP PUBLIC SERVICES, INC.

By: _____
Name: _____
Title: _____

By: 
Name: STEVE PEX
Title: PRESIDENT
Date: 4/16/2005
Tax I.D. No. 54-1865804


REVIEWED BY CONTRACTS

K. Devlin KAD

ATTEST/SEAL:

CITY OF HOUSTON, TEXAS

Signed by:


City Secretary

Bill White John Arang
Mayor

~~APPROVED. Countersigned By:~~
Annise D. Parker
Mary Ann Grant
City Controller

~~COUNTERSIGNED BY:~~ APPROVED
Richard Harris
Chief Information Officer

APPROVED AS TO FORM:

DATE COUNTERSIGNED:

So W. [Signature]
Sr. Assistant City Attorney

4/29/05

L.D. File No. 0450400015001

II. DEFINITIONS

All capitalized terms in this Agreement have the meaning set out in this Section or Exhibit "C".

"Acceptance" is defined in the Statement of Work.

"Business Day" means Monday through Friday between the hours of 8:00 a.m. and 5:00 p.m.

Central Time excluding the City's holidays.

"Central Time" means Houston time.

"Countersignature Date" means the date the City Controller countersigns this Agreement.

"Deliverables" are identified in the Statement of Work.

"Director" means the City's Chief Information Officer, and his or her designee or successor.

"ERP Software" means that Software that is licensed to the City by SAP Public Services, Inc. pursuant to the Software End-User License Agreement in Exhibit "C," including any Modifications or Extensions.

"Key Personnel" means the people identified in the Statement of Work and includes employees of both Contractor and Contractor's subcontractors.

"Original Contract Amount" means \$20,076,441, including future year maintenance fees and up to \$2 million for Special Services (as such term is defined in Exhibit "A") subject to allocation.

"Services" means software consulting and professional services set out in the Statement of Work.

"Software End-User License Agreement" or "EULA" means the software license signed between the City and SAP attached as Exhibit "C."

"Software License" means the licenses set out in Exhibit "C".

"ERP System" shall have the meaning set forth in the Statement of Work.

Statement of Work is attached hereto as Exhibit "A".

"Third Party Software" means the RWD & BSI products set out in Exhibit "C" and licensed to the City by SAP.

III. DUTIES OF CONTRACTOR

A. Scope of Services

In consideration of the payments specified in this Agreement, Contractor shall furnish to the City:

1. The Software, Licenses and Maintenance set out in Exhibit "C", and
2. The Services described in the Statement of Work.

B. Reports

Contractor shall submit all reports and progress updates required by the Director in a form agreed to in the Statement of Work.

C. Schedule of Performance

Time of Performance

The Director shall provide Contractor a written Notice to Proceed specifying a date to begin performance (the "Start Date"), which shall be no later than five Business Days after the Countersignature Date. Contractor shall begin its performance no later than the Start Date and shall continue to perform diligently until this Agreement is terminated or all services are completed, whichever comes first.

Schedule

Contractor shall complete each task as set out in Exhibit "A" or in the implementation Plan

developed under this Agreement. If Contractor fails to complete the implementation of the System within the time established in the Implementation Plan as the result of its own acts or omissions, Director may in his or her sole discretion, terminate this Agreement or grant time extensions as set out in Section D below.

D. Time Extensions

If Contractor requests an extension of time to complete its performance, then the Director may, in his or her sole discretion, extend the time for a period not to exceed 12 months. The extension must be in writing but does not require amendment of this Agreement. To the extent that an extension is due to Contractor delay and not a Force Majeure event, Contractor is not entitled to damages for delay(s); however, any additional costs incurred by Contractor due to delay by the City shall be administered through the Request for Change process, but they shall never exceed the balance of appropriation available under the Agreement.

E. Additions (Change Orders)

(1) Additional Products and Services

The Director may add additional Services "Deliverables" by giving written notification to Contractor via a mutually agreed Change Order. The Director may obtain Licenses for additional Software by mutually acceptable appendices executed by both parties, subject to the City's allocation of funds to pay for them. For purposes of this Section, the Effective Date means the date on which Contractor receives written notification of the addition(s). As of the Effective Date, each additional Deliverable is subject to this Agreement, as if it had originally been a part, but the charge for each additional Deliverable and service starts to accrue only on the Effective Date. If a Contractor is unable to meet an original deadline due to any additional Deliverable, then such delay shall not be

deemed a default nor grounds for termination of this Agreement; however, Contractor shall meet the new deadline established in the Change Order identifying the Additional Deliverables.

The Director may delete Software, licenses or maintenance services in accord with the terms set forth in section 5 of Exhibit C (Software and licenses) and paragraph 6 of the Maintenance Schedule to Exhibit C (Maintenance).

Total charges for additions to this Agreement must never exceed 25% of the Original Contract Amount unless:

- ▣ the additions are exempt from the competitive bidding or proposal requirements, set forth in Tex. Local Govt. Code Chapter 252; or
- ▣ the City acquires the additions from Contractor through a competitive bid or competitive proposal.

(2) Change Orders

The Director may request Change Orders to add Deliverables or services in an aggregate amount not to exceed 10% of the total contract amount (including all phases) without the need to return to Council for approval as long as Council has appropriated sufficient funds to pay for such Change Orders.

F. Prompt Payment of Subcontractors

Contractor shall make timely payments to all persons and entities supplying labor, materials, or equipment for the performance of this Agreement. **CONTRACTOR SHALL DEFEND AND INDEMNIFY THE CITY FROM ANY CLAIMS OR LIABILITY ARISING OUT OF CONTRACTOR'S FAILURE TO MAKE OR DELAY IN MAKING NON-DISPUTED PAYMENTS TO SUBCONTRACTORS.** Contractor shall submit disputes relating to payment of

MWBE subcontractors, if any, to arbitration in the same manner as any other disputes under the MWBE subcontract. Contractor shall make timely payments for invoices that are not in dispute.

G. Personnel of the Contractor

Contractor shall assign a Project Manager (CPM) to serve as the City's primary point of contact for all tasking, work schedule assignments/deviations, change management and customer liaison issues for the duration of the Project. The CPM shall be one of Contractor's Key Personnel.

H. INDEMNIFICATION

CONTRACTOR AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:

- (1) CONTRACTOR'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', CONTRACTORS', OR SUBCONTRACTORS' (COLLECTIVELY IN NUMBERED PARAGRAPHS 1-2, "CONTRACTOR") ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;**
- (2) CONTRACTOR'S ACTUAL OR ALLEGED STRICT STATUTORY LIABILITY, WHETHER CONTRACTOR IS IMMUNE FROM LIABILITY**

OR NOT.

CONTRACTOR SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY HARMLESS DURING THE TERM OF THIS AGREEMENT AND FOR FOUR YEARS AFTER THE AGREEMENT TERMINATES. CONTRACTOR'S INDEMNIFICATION IS LIMITED TO \$500,000 PER OCCURRENCE. CONTRACTOR SHALL NOT INDEMNIFY THE CITY FOR THE CITY'S SOLE NEGLIGENCE.

I. DELIVERABLES INDEMNIFICATION - (PATENT, COPYRIGHT, TRADEMARK, AND TRADE SECRET INFRINGEMENT)

CONTRACTOR AGREES TO AND SHALL RELEASE AND DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL CLAIMS OR CAUSES OF ACTION BROUGHT AGAINST THE CITY BY ANY PARTY, INCLUDING CONTRACTOR, ALLEGING THAT THE CITY'S USE OF THE DELIVERABLES SUPPLIED BY CONTRACTOR IN RELATION TO THE SERVICES PROVIDED HEREUNDER (EXCLUDING ITEMS LICENSED BY SAP PURSUANT TO THE END-USER AGREEMENT) INFRINGES ON ANY UNITED STATES PATENT, COPYRIGHT, OR TRADEMARK, OR MISAPPROPRIATES A TRADE SECRET. CONTRACTOR SHALL PAY ALL COSTS (INCLUDING, WITHOUT LIMITATION, ATTORNEY'S FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS, AND INTEREST) AND DAMAGES AWARDED.

CONTRACTOR SHALL NOT SETTLE ANY CLAIM ON TERMS, WHICH PREVENT THE CITY FROM USING THE DELIVERABLES WITHOUT THE CITY'S

PRIOR WRITTEN CONSENT.

WITHIN 60 DAYS AFTER BEING NOTIFIED OF THE CLAIM OR LONGER AS MUTUALLY AGREED TO BETWEEN THE PARTIES, CONTRACTOR SHALL, AT ITS OWN EXPENSE REPLACE OR MODIFY THEM WITH COMPATIBLE AND FUNCTIONALLY EQUIVALENT PRODUCTS.

J. SOFTWARE INDEMNIFICATION – PATENT, COPYRIGHT, TRADEMARK, AND TRADE SECRET INFRINGEMENT

SAP agrees to the Patent Indemnity in the Software End-User License Agreement

K. INDEMNIFICATION PROCEDURES

(1) Notice of Claims. If the City or Contractor receives notice of any claim or circumstances, which could give rise to an indemnified loss, the receiving party shall give written notice to the other party within ten days. The notice must include the following:

- (a) A description of the indemnification event in reasonable detail,
- (b) the basis on which indemnification may be due, and
- (c) the anticipated amount of the indemnified loss.

This notice does not estop or prevent the City from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice. If the City does not provide this notice within the ten-day period, it does not waive any right to indemnification except to the extent that Contractor is prejudiced, suffers loss, or incurs expense because of the delay.

(2) Defense of Claims

(a) Assumption of Defense. Contractor may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to the City. Contractor shall then control the defense and any negotiations to settle the claim. Within 10 days after receiving written notice of the indemnification request, Contractor must advise the City as to whether or not it will defend the claim. If Contractor does not assume the defense, the City shall assume and control the defense, and all defense expenses constitute an indemnification loss.

(b) Continued Participation. If Contractor elects to defend the claim, the City may retain separate counsel to participate in (but not control) the defense and to participate in (but not control) any settlement negotiations, as reasonably determined by SAP. Contractor may settle the claim without the consent or agreement of the City, unless it (i) would result in injunctive relief or other equitable remedies that would adversely affect the City (ii) would require the City to pay amounts that Contractor does not fund in full, (iii) would not result in the City's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

L. Insurance

Contractor shall maintain in effect certain insurance coverage, which is described as follows:

- (1) Risks and Limits of Liability. Contractor shall maintain the following coverages and limits of liability:

<u>(Coverage)</u>	<u>(Limit of Liability)</u>
Workers' Compensation	Statutory for Worker's Compensation
Employer's Liability	Bodily Injury by accident \$1,000,000 (each accident) Bodily Injury by Disease \$1,000,000 (policy limit) Bodily Injury by Disease \$1,000,000 (each employee)
Commercial General Liability; Broad Form Coverage;	Bodily Injury and Property Damage, Combined Limits of

Contractual Liability; Bodily and Personal Injury; and Completed Operations.

\$500,000 each Occurrence
and \$1 million aggregate

Automobile Liability Insurance
(for vehicles Contractor
uses in performing under this
Agreement, including Employer's
Non-Owned and Hired Auto
Coverage)

\$500,000 combined single limit
per occurrence

Professional Liability Coverage

\$1 million per occurrence/aggregate

Excess Liability

\$1 million aggregate

Aggregate Limits are per 12-month policy period unless otherwise indicated.

- (2) Form of Policies. Contractor shall provide the City with insurance certificates that shall include the coverage specified above.
- (3) Issuers of Policies. The issuer of any policy shall have a Certificate of Authority to transact insurance business in Texas or have a Best's rating of at least B+ and a Best's Financial Size Category of Class VI or better, according to the most current edition Best's Key Rating Guide, Property-Casualty United States.
- (4) Insured Parties. Each policy, except those for Workers' Compensation, Employer's Liability, and Professional Liability, must name the City (and its officers, agents, and employees) as Additional Insured parties on the policy and all renewals or replacements.
- (5) Deductibles. Contractor shall be responsible for and bear any claims or losses to the extent of any deductible amounts and waives any claim it may have for the same against the City, its officers, agents, or employees.
- (6) Cancellation. Each policy must state that it may not be canceled, or nonrenewed

unless the Contractor gives the Director 30 calendar days' advance written notice. Contractor shall give written notice to the Director within five days of the date on which total claims by any party against Contractor reduce the aggregate amount of coverage below the amounts required by this Agreement. In the alternative, the policy may contain an endorsement establishing a policy aggregate for the particular project or location subject to this Agreement.

- (7) Subrogation. Contractor's Workers' Compensation Policy shall include an endorsement waiving any claim of right of subrogation against the City, its officers, agents or employees.
- (8) Endorsement of Primary Insurance. Each policy, except Workers' Compensation and Professional Liability (if any), must contain an endorsement that the policy is primary to any other insurance available to the additional insured parties with respect to claims arising under this Agreement.
- (9) Liability for Premium. Contractor shall pay all insurance premiums, and the City shall not be obligated to pay any premiums.
- (10) Subcontractors. Contractor shall require all subcontractors to carry insurance naming the City as an additional insured and meeting all of the above requirements except amount. The amount must be commensurate with the amount of the subcontract, but in no case less than \$500,000 per occurrence. Contractor shall provide copies of insurance certificates to the Director.
- (11) Proof of Insurance.
 - (a) Prior to execution of this Agreement, Contractor shall furnish the Director with

Certificates of Insurance

(b) Contractor shall continuously and without interruption, maintain in force the required insurance coverages specified in this Section. If Contractor does not comply with this requirement, the Director, at his or her sole discretion, may immediately suspend Contractor from any further performance under this Agreement and begin procedures to terminate for default, or

The City shall never waive or be estopped to assert its right to terminate this Agreement because of its acts or omissions regarding its review of insurance documents.

(12) Other Insurance. If requested by the Director, Contractor shall furnish adequate evidence of Social Security and Unemployment Compensation Insurance, to the extent applicable to Contractor's operations under this Agreement.

M. Warranties

1. Contractor's performance of the services under this Agreement shall conform to the professional standards prevailing in the applicable industry with respect to the scope, quality, due diligence, and care. Contractor shall perform all work using trained and skilled persons having experience performing the work required under this Agreement.

2. SAP WARRANTS THAT THE SERVICES IT PROVIDES HEREUNDER, FOR A PERIOD OF THIRTY (30) DAYS AFTER THE DATE THE DELIVERABLES ASSOCIATED WITH SUCH SERVICES ARE ACCEPTED BY THE CITY, WILL CONFORM SUBSTANTIALLY WITH THE REQUIREMENTS IN THE STATEMENT OF WORK.

3. FOR BREACH OF THE FOREGOING WARRANTIES, CITY'S SOLE AND EXCLUSIVE REMEDIES ARE SAP'S RE-PERFORMANCE OF THE UNSATISFACTORY SERVICES OR ACTUAL DAMAGES UP TO THE LIMIT OF LIABILITY SET OUT IN

SECTION V OF THIS ARTICLE.

4. SAP MAKES NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, NOR ANY OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, IN CONNECTION WITH THIS AGREEMENT AND THE SERVICES PROVIDED HEREUNDER NOT EXPRESSLY SET OUT HEREIN.

N. Use of Work Products

- (1) All rights, title and interest in any Modification shall be governed by the terms set forth in the terms listed in the EULA.
- (2) Licensee agrees that any and all ideas, concepts, or other intellectual property rights related in any way to the techniques, knowledge or processes of the SAP Services and deliverables provided under this Agreement, whether or not developed for Licensee, are the exclusive property of SAP. SAP shall have the sole and exclusive right, title and ownership to such technology.

O. Acceptance

All criteria and standards for Acceptance of each Deliverable are set forth in Exhibit "A", Statement of Work.

P. Licenses and Permits

Contractor shall obtain, maintain, and pay for all licenses, permits, and certificates including all professional licenses required by any statute, ordinance, rule, or regulation. Contractor shall immediately notify the Director of any suspension, revocation, or other detrimental action against his or her license.

Q. Compliance with Equal Opportunity Ordinance

Contractor shall comply with City's Equal Employment Opportunity Ordinance as set out in Exhibit "D".

R. MWBE Compliance

Contractor shall comply with the City's Minority and Women Business Enterprise ("MWBE") programs as set out in Chapter 15, Article V of the City of Houston Code of Ordinances. Contractor shall make good faith efforts to award subcontracts or supply agreements in at least 35% of the value of the services portion of this Agreement to MWBEs. Contractor acknowledges that it has reviewed the requirements for good faith efforts on file with the City's Affirmative Action Division and will comply with them.

Contractor shall require written subcontracts with all MWBE subcontractors and shall submit all disputes with MWBEs to binding arbitration if directed to do so by the Affirmative Action Division Director. MWBE subcontracts must contain the terms set out in Exhibit "H".

S. Drug Abuse Detection and Deterrence

(1) It is the policy of the City to achieve a drug-free workforce and workplace. The manufacture, distribution, dispensation, possession, sale, or use of illegal drugs or alcohol by contractors while on City Premises is prohibited. Contractor shall comply with all the requirements and procedures set forth in the Mayor's Drug Abuse Detection and Deterrence Procedures for Contractors, Executive Order No. 1-31 ("Executive Order"), which is incorporated into this Agreement and is on file in the City Secretary's Office.

(2) Before the City signs this Agreement, Contractor shall file with the Contract Compliance Officer for Drug Testing ("CCODT"):

- (a) a copy of its drug-free workplace policy,

- (b) the Drug Policy Compliance Agreement substantially in the form set forth in Exhibit "E," together with a written designation of all safety impact positions and,
- (c) if applicable (e.g. no safety impact positions), the Certification of No Safety Impact Positions, substantially in the form set forth in Exhibit "G."

If Contractor files a written designation of safety impact positions with its Drug Policy Compliance Agreement, it also shall file every 6 months during the performance of this Agreement or on completion of this Agreement if performance is less than 6 months, a Drug Policy Compliance Declaration in a form substantially similar to Exhibit "F." Contractor shall submit the Drug Policy Compliance Declaration to the CCODT within 30 days of the expiration of each 6-month period of performance and within 30 days of completion of this Agreement. The first 6-month period begins to run on the date the City issues its Notice to Proceed or if no Notice to Proceed is issued, on the first day Contractor begins work under this Agreement.

(3) Contractor also shall file updated designations of safety impact positions with the CCODT if additional safety impact positions are added to Contractor's employee work force.

(4) Contractor shall require that its subcontractors comply with the Executive Order, and Contractor shall secure and maintain the required documents for City inspection.

T. LIMITATION OF LIABILITY

ANYTHING TO THE CONTRARY HEREIN NOTWITHSTANDING, UNDER NO CIRCUMSTANCES SHALL SAP OR ITS CONSULTANTS BE LIABLE TO CITY IN RELATION TO SERVICES PROVIDED UNDER THIS AGREEMENT FOR AN AMOUNT OF DAMAGES IN THE AGGREGATE IN EXCESS OF 150% OF THE TOTAL CONTRACT

AMOUNT SPECIFIED IN EXHIBIT "B" MINUS ANY FEES NOT YET PAID TO CONTRACTOR BY THE CITY AT THE TIME OF CONTRACTOR'S DEFAULT OR BE LIABLE FOR SPECIAL, INCIDENTAL, CONSEQUENTIAL OR INDIRECT DAMAGES, LOSS OF GOOD WILL OR BUSINESS PROFITS, WORK STOPPAGE, DATA LOSS, COMPUTER FAILURE OR MALFUNCTION, ANY AND ALL OTHER COMMERCIAL DAMAGES OR LOSS, OR EXEMPLARY OR PUNITIVE DAMAGES, EVEN IF SAP HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

IV. DUTIES OF CITY

A. Payment Terms

(1) Upon acceptance of the Deliverables, the City shall pay Contractor as set out in Exhibit "B, subject to appropriation of funds as set out below.

B. Taxes

The City is exempt from payment of Federal Excise and Transportation Tax and Texas Limited Sales and Use Tax. Contractor's invoices to the City must not contain assessments of any of these taxes. The Director has furnished the City's exemption certificate and federal tax identification number to Contractor. The fees listed in Exhibit B do not include federal, state or local sales, use, property, excise, services or other taxes now or hereafter levied.

C. Method of Payment

Payment for Services

The City shall pay Contractor on the basis of invoices submitted no earlier than the time of Director's Acceptance of each Deliverable by Contractor showing the specific Deliverables accepted by the Director. The City shall make payment via Contractor within 30 Calendar Days after receipt

of Contractor's invoice.

D. Method of Payment - Disputed Payments

If the City disputes any items in an invoice Contractor submits for any reasonable reason, including lack of supporting documentation, the Director shall temporarily delete the disputed item and pay the remainder of the invoice. The Director shall promptly notify Contractor of the dispute and request remedial action. If the dispute is resolved in Contractor's favor, Contractor shall include the resolved amount, to which it is entitled, if any amount on a subsequent regularly scheduled invoice or on a special invoice for the disputed item only.

E. Limit of Appropriation

(1) The City's duty to pay money to Contractor under this Agreement is limited in its entirety by the provisions of this Section.

(2) In order to comply with Article II, Sections 19 and 19a of the City's Charter and Article XI, Section 5 of the Texas Constitution, the City has appropriated and allocated the sum of \$15,113,464 to pay money due under this Agreement (the "Original Allocation"). The executive and legislative officers of the City, in their discretion, may allocate supplemental funds for this Agreement, but they are not obligated to do so. Therefore, the parties have agreed to the following procedures and remedies:

(3) The City makes a supplemental allocation by sending a notice signed by the Director and the City Controller to Contractor in substantially the following form:

"NOTICE OF SUPPLEMENTAL ALLOCATION OF FUNDS"

TO: [Name of Contractor]

FROM: City of Houston, Texas (the "City")

DATE: [Date of notice]

SUBJECT: Supplemental allocation of funds for the purpose of the "[title of this Agreement]" between the City and (name of Contractor) countersigned by the City Controller on (Date of Countersignature) (the "Agreement").

I, (name of City Controller), City Controller of the City of Houston, certify that the supplemental sum of \$ _____, upon the request of the below-signed Director, has been allocated for the purposes of the Agreement out of funds appropriated for this purpose by the City Council of the City of Houston. This supplemental allocation has been charged to such appropriation.

The aggregate of all sums allocated for the purpose of such Contract, including the Original Allocation, and all supplemental allocations (including this one), as of the date of this notice, is \$ _____.

SIGNED:

(Signature of the City Controller)
City Controller of the City

REQUESTED:

(Signature of the Director)
Director

(4) The Original Allocation plus all supplemental allocations are the Allocated Funds. The City shall never be obligated to pay any money under this Agreement in excess of the Allocated Funds. Contractor may from time to time inquire as to the balance of Allocated Funds remaining in this Agreement, and the Director shall report the balance to Contractor. If Allocated Funds are exhausted Contractor is not obligated to continue to perform unless it receives a notice of Supplemental Allocation. Contractor's only remedy is suspension of its performance until it receives notice of a sufficient Supplemental Allocation or termination of its performance under this Agreement altogether, and it has no other remedy in law or in equity against the City and no right to damages of any kind. If the City terminates Contractor performance due to lack of Allocated Funds,

such termination shall not constitute a Material Breach by City.

F. Access to Sites

Contractor may enter and leave the premises in which the System or any part of it is installed at all reasonable times without charge. Contractor and its employees may use the common areas and roadways of the premises where it is to perform the services together with all facilities, equipment, improvements, and services provided in connection with the premises for common use. Excluding normal wear and tear, Contractor shall repair any damage caused by it or its employees as a result of its use of the common areas. Contractor shall comply with City personnel policies attached hereto, including, but not limited to, dress codes and security policies.

G. Access to Data

The City shall, to the extent permitted by law, allow Contractor to access and make copies of documents in the possession or control of the City or available to it that are reasonably necessary for Contractor to perform under this Agreement, and as described in the Statement of Work.

The City does not, however, represent that all existing conditions are fully documented, nor is the City obligated to develop new documentation for Contractor's use.

H. City Project Manager

The Director shall identify a City Project Manager to serve as the primary contract person with Contractor for the duration of the Project.

I. Confidentiality

Both parties shall handle Proprietary Information in accordance with the terms set out in Section 6 of the SAP Software License in Exhibit "C".

J. Additional Duties of the City

The City shall perform the additional duties set out in Exhibit "A".

V. TERM AND TERMINATION

A. Agreement Term

This Agreement is effective on the Countersignature Date and remains in effect for three years after Countersignature Date unless sooner terminated under this Agreement. The term of the Software License and Maintenance Agreement is set out in Exhibit "C" and shall survive the termination of this Agreement.

B. Renewals

If the Director, at his or her sole discretion, makes a written request for renewal to Contractor at least 30 calendar days before expiration of the then-current term and if sufficient funds are allocated, then, upon expiration of the initial term, the Agreement may be renewed by a contract amendment at a price and upon terms agreed to by the parties and approved by City Council.

C. Termination for Convenience

The City may terminate this Agreement by giving 30 calendar days written notice to Contractor. On receiving the notice, Contractor shall, unless the notice directs otherwise, immediately discontinue all services under this Agreement and cancel all existing orders and subcontracts that are chargeable to this Agreement. As soon as practicable after receiving the termination notice, Contractor shall submit an invoice showing in detail the services performed and the products provided under this Agreement up to the termination date. The City shall then pay the fees to Contractor for services actually performed and products furnished, including any closeout services requested by the Director, but not already paid for, in the same manner as prescribed in Section IV.C. unless the fees exceed the allocated funds remaining under this Agreement.

Contractor shall not be obligated to provide any close-out services for which funds have not been allocated.

TERMINATION OF THIS AGREEMENT AND RECEIPT OF PAYMENT AS PROVIDED IN THIS AGREEMENT ARE CONTRACTOR'S ONLY REMEDIES FOR THE CITY'S TERMINATION FOR CONVENIENCE, WHICH DOES NOT CONSTITUTE A DEFAULT OR BREACH OF THIS AGREEMENT. CONTRACTOR WAIVES ANY CLAIM (OTHER THAN ITS CLAIM FOR PAYMENT AS SPECIFIED IN THIS SECTION), IT MAY HAVE NOW OR IN THE FUTURE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM THE CITY'S TERMINATION FOR CONVENIENCE.

D. Termination for Cause by Contractor

Contractor may terminate its performance under this Agreement only if the City defaults and fails to cure the default after receiving written notice of it. Default by the City occurs if the City fails to perform one or more of its material duties under this Agreement. If a default occurs and Contractor wishes to terminate the Agreement, then Contractor must deliver a written notice to the Director describing the default and the proposed termination date. The date must be at least 30 days after the Director receives notice. Contractor, at its sole option, may extend the proposed termination date to a later date. If the City cures the default before the proposed termination date, then the proposed termination is ineffective. If the City does not cure the default before the proposed termination date, then Contractor may terminate its performance under this Agreement on the termination date.

E. Termination for Cause by City

If Contractor defaults under this Agreement, the Director may either terminate this

Agreement after allowing Contractor to cure the default as provided below. Default by Contractor occurs if:

- (1) Contractor fails to perform any of its material duties under this Agreement, including but not limited to complying with project schedules and deadlines as they may be modified pursuant to the Accountable/Contributing Party process set out in of the Statement of Work;
- (2) Contractor becomes insolvent;
- (3) all or a substantial part of Contractor's assets are assigned for the benefit of its creditors; or
- (4) a receiver or trustee is appointed for Contractor.

If a default occurs, the Director shall deliver a written notice to Contractor describing the default and the termination date no sooner than 30 days after the date of notice. The Director, at his or her sole option, may extend the termination date to a later date. If the Contractor cures the default to the Director's satisfaction before the termination date, then the termination is ineffective. If Contractor does not cure the default before the termination date, then the Director may terminate this Agreement on the termination date, at no further obligation of the City.

To effect final termination, the Director must notify Contractor in writing. After receiving the notice, Contractor shall, unless the notice directs otherwise, immediately discontinue all services under this Agreement, and promptly cancel all orders or subcontracts chargeable to this Agreement. The City shall then pay the fees to Contractor for services actually performed and products furnished in accord with this Agreement prior to termination, including the costs for any close-out services requested by the Director not already paid for, in the same manner as prescribed in Section IV.C.

Unless the fees exceed the allocated funds remaining under this Agreement. Contractor shall not be obligated to provide any close-out services for which funds have not been allocated.

VI. MISCELLANEOUS

A. Independent Contractor

Contractor shall perform its obligations under this Agreement as an independent Contractor and not as an employee of the City.

B. Force Majeure

1. Neither party is liable for delays or other failures to perform its obligations under this Agreement to the extent the delay or failure is a result of Force Majeure. Force Majeure means, fires, floods, and other acts of God, explosions, war, terrorist acts, riots, court orders, and the acts of superior governmental or military authority.

2. This relief is not applicable unless the affected party does the following:

- (a) uses commercially reasonable due diligence to reduce or remove the effects of the Force Majeure as quickly as possible; and
- (b) provides the other party with prompt written notice of the cause and its anticipated effect.

3. The City may perform contract functions itself or contract them out during periods of Force Majeure. Such performance is not a default or breach of this Agreement by the City.

4. If the Force Majeure continues for more than 60 days from the date performance is affected, the Director may Terminate for Convenience as stated in section C above by giving 7 days' written notice to Contractor. **EACH PARTY WAIVES ANY CLAIM IT MAY HAVE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM THE TERMINATION**

EXCEPT FOR AMOUNTS DUE UNDER THE AGREEMENT AT THE TIME OF THE TERMINATION.

5. Contractor is not relieved from performing its obligations under this Agreement due to a strike or work slowdown of SAP employees or the termination of employment of individuals assigned to provide services under the Agreement. Contractor shall employ only fully trained and qualified personnel during a strike.

C. Severability

If any part of this Agreement is for any reason found to be unenforceable, all other parts remain enforceable unless the result materially prejudices either party.

D. Entire Agreement

This Agreement merges the prior negotiations and understandings of the Parties and embodies the entire agreement of the Parties. No other agreements, assurances, conditions, covenants (express or implied), or other terms of any kind, exist between the Parties regarding this Agreement. The City shall not issue any Purchase Orders under this Agreement.

E. Written Amendment

Unless otherwise specified elsewhere in this Agreement, this Agreement may be amended only by written instrument executed on behalf of the City by the Mayor or City Council and Contractor. The Director is only authorized to perform the functions specifically delegated to him or her in this Agreement.

F. Applicable Laws

This Agreement is subject to the laws of the State of Texas, the City Charter and Ordinances, the laws of the federal government of the United States, and all rules and regulations of any

regulatory body or officer having jurisdiction.

Venue for any litigation relating to this Agreement is Harris County, Texas.

G. Notices

All notices required or permitted by this Agreement must be in writing and are deemed delivered on the earlier of the date actually received or the third day following: (1) deposit in a United States Postal Service post office or other prominent overnight carrier receptacle; (2) with proper postage (certified mail, return receipt requested); and (3) addressed to the other party at the address set out in the preamble of this Agreement or at such other address as the receiving party designates by proper notice to the sending party.

H. Captions

Captions contained in this Agreement are for reference only, and, therefore, have no effect in construing this Agreement. The captions are not restrictive of the subject matter of any section in this Agreement.

I. Non-Waiver

If either party fails to require the other to perform a term of this Agreement, that failure does not prevent the party from later enforcing that term and all other terms. If either party waives the other's breach of a term, that waiver does not waive a later breach of this Agreement.

An approval by a Party, or by any other employee or agent of the Party, of any part of the other Party's performance does not waive compliance with this Agreement or establish a standard of performance other than that required by this Agreement and by law. The Director is not authorized to vary the terms of this Agreement.

J. Inspections and Audits

City representatives may have the right to perform, or have performed, (1) audits of Contractor's books and records that are directly related to the invoices issued under this Agreement, and (2) inspections of all places where work is undertaken in connection with this Agreement during Contractor's normal business hours upon four business days' advance notice by the City. Contractor shall keep its books and records available for this purpose for at least four years after this Agreement terminates. In the event such an audit by the City reveals any overpayments by the City or Contractor, the Contractor shall refund the City the full amount of such overpayments within 30 days of such audit findings, or the City at its option, may deduct such amounts owing the City from any payments due under this Agreement to the Contractor.

K. Enforcement

The City Attorney or his or her designee may enforce all legal rights and obligations under this Agreement without further authorization. Contractor shall provide to the City Attorney all documents and records that the City Attorney reasonably requests to assist in determining Contractor's compliance with this Agreement, with the exception of those documents made confidential by federal or State law or regulation.

L. Ambiguities

If any term of this Agreement is ambiguous, it shall not be construed for or against any party on the basis that the party did or did not write it.

M. Survival

Article III Sections H, I, K, N, M(4) and T, Article IV Section I, and Article VI Section F.

N. Publicity

Contractor shall direct all inquiries from media concerning Agreement to the Director.

O. Parties In Interest

This Agreement does not bestow any rights upon any third party, but binds and benefits the City and Contractor only.

P. Successors and Assigns

This Agreement binds and benefits the Parties and their legal successors and permitted assigns; however, this provision does not alter the restrictions on assignment and disposal of assets set out in the following paragraph. This Agreement does not create any personal liability on the part of any officer or agent of the City or the Contractor.

Q. Business Structure and Assignments

Neither Party shall assign this Agreement at law or otherwise or dispose of all or substantially all of its assets without the other Party's prior written consent, except the Parties agree that SAP may assign this Agreement to SAP America, Inc, or SAP AG. Nothing in this clause, however, prevents the assignment of accounts receivable or the creation of a security interest as described in §9.406 of the Texas Business & Commerce Code. In the case of such an assignment, Contractor shall immediately furnish the City with proof of the assignment and the name, telephone number, and address of the Assignee and a clear identification of the fees to be paid to the Assignee.

R. Remedies Cumulative

Unless otherwise specified elsewhere in this Agreement, the rights and remedies contained in this Agreement are exclusive but are cumulative of all rights and remedies that exist now or in the future subject to Part III, Section V, Limit of Liability, of this Agreement. Neither party may terminate its duties under this Agreement except in accordance with its provisions.

S. Contractor Debt

IF CONTRACTOR, AT ANY TIME DURING THE TERM OF THIS AGREEMENT, INCURS A DEBT, AS THE WORD IS DEFINED IN § 15-122 OF THE HOUSTON CITY CODE OF ORDINANCES, IT SHALL IMMEDIATELY NOTIFY THE CITY CONTROLLER IN WRITING. IF THE CITY CONTROLLER BECOMES AWARE THAT CONTRACTOR HAS INCURRED A DEBT, SHE SHALL IMMEDIATELY NOTIFY CONTRACTOR IN WRITING. IF CONTRACTOR DOES NOT PAY THE DEBT WITHIN 30 DAYS OF EITHER SUCH NOTIFICATION, THE CITY CONTROLLER MAY DEDUCT FUNDS IN AN AMOUNT EQUAL TO THE DEBT FOR ANY PAYMENTS OWED TO CONTRACTOR UNDER THIS AGREEMENT, AND CONTRACTOR WAIVES ANY RECOURSE THEREFORE.

T. Performance Bond

Within ten (10) business days of the Effective Date of this Agreement, SAP shall execute a Performance Bond, in the form attached to this Agreement as Exhibit "I", with a corporate surety qualified to conduct business in the State of Texas, acceptable to the City.